

ARKANSAS SUPREME COURT

No. CR 05-1112

CHARLES G. RODGERS
a/k/a CHARLES GENTRY RODGERS
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered January 11, 2007

PRO SE APPEAL FROM THE
CIRCUIT COURT OF PHILLIPS
COUNTY CR 2002-171, HON. L. T.
SIMS, II, JUDGE

AFFIRMED.

PER CURIAM

Charles G. Rodgers, also known as Charles Gentry Rodgers, was convicted of rape and sentenced as a habitual offender to life imprisonment in the Arkansas Department of Correction. This court affirmed. *Rodgers v. State*, 360 Ark. 24, 199 S.W.3d 625 (2004). Subsequently, appellant timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1. The trial court denied the petition and appellant sought to file a belated appeal of the trial court's decision. This court granted the motion for belated appeal. *Rodgers v. State*, CR 05-1112 (Nov. 3, 2005) (*per curiam*).

The charges against appellant stem from allegations made by his former girlfriend that appellant was found in her daughter's room under the covers with her daughter. The child, who was twelve years old at the time, testified at trial that appellant had raped her. His defense at trial was denial of the allegations made by the victim and her mother. Appellant did not testify on his own behalf during the trial.

In his petition for postconviction relief, appellant maintained that his trial counsel rendered ineffective assistance. Specifically, appellant claimed that the trial attorney: (1) failed to obtain a comparison of the fluids found during the hospital rape examination to appellant's DNA; (2) failed to call the examining physician as a witness at trial; (3) failed to object to violation of the speedy trial requirements due to the additional amount of time taken for conducting and reporting his mental examination. Appellant also sought an evidentiary hearing on the allegations contained in his petition.¹

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

To prevail on a claim of ineffective assistance of counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness, and that but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Andrews v. State*, 344 Ark. 606, 42 S.W.3d 484 (2001) (*per curiam*). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). To rebut this presumption, appellant must show that there is a reasonable probability that the decision reached would have been different absent the

¹A hearing on appellant's petition was held on April 1, 2005. At the hearing, the trial court stated that it would appoint counsel to represent appellant in the postconviction matter, and that an evidentiary hearing would be set for April 15, 2005. However, in the order that denied the petition, the trial court held that appointment of counsel was not warranted and entry of the order negated the need for a subsequent hearing.

errors. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A reasonable probability is one that is sufficient to undermine confidence in the outcome of the trial. *Id.*

As to appellant's first point on appeal, he claims that the trial court erred in holding that trial counsel was not ineffective for failing to raise issues related to speedy trial on direct appeal or in a petition for writ of prohibition. However, appellant did not raise this claim in his original Rule 37.1 petition filed in the trial court, and the trial court's order does not address this point. It is well-settled that we will not consider an argument raised for the first time on appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

Further, appellant fails to set forth on appeal the argument contained in his original petition: that trial counsel was ineffective for failing to seek dismissal of the charges against him based on a speedy trial violation. Issues raised below but not argued on appeal are considered abandoned. *Jordan v. State*, 356 Ark. 248, 147 S.W.3d 691 (2004).

Additionally, Rule 37.1 does not provide a remedy when an issue could have been raised in the trial or argued on appeal. *See, e.g., Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001), *citing Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Here, the trial court noted in its order that appellant raised the speedy trial issue in the lower court. Thus, this issue was one properly made at trial and not by way of a claim for postconviction relief. We cannot say that the trial court's holding on this point was erroneous.

Next, appellant argues on appeal that the trial court erred in finding that trial counsel did not render ineffective assistance for failure to obtain a DNA comparison of fluids obtained from the victim during her examination at the emergency room. The court's order cited the testimony of a witness at trial for the State as the basis for its denial of appellant's argument. Scott Sherrill, a

forensic biologist with the Arkansas State Crime Lab, testified at trial that the fluid specimens retrieved by the hospital and contained in the rape kit were insufficient in quantity to allow DNA testing, but confirmed that semen was present on the victim's clothing.

As the crime lab lacked a sufficient amount of fluid upon which to perform DNA testing, this argument has no basis in fact. Had trial counsel sought DNA testing, it would have been impossible for the State Crime Lab to comply with the request. Trial counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Greene, supra*; *Camargo, supra*. We find no error in the trial court's ruling and affirm on this point.

Appellant's last point on appeal argues that the trial court erred when it denied appellant an opportunity to be heard through counsel at the Rule 37.1 hearing. In essence, appellant complains that he was entitled to an evidentiary hearing and to appointment of counsel.

This court has recognized that the trial court is not required to hold an evidentiary hearing on a Rule 37.1 petition, even in death penalty cases. *Sanders v. State*, 352 Ark. 16, 98 S.W.3d 35 (2003); *Nance v. State*, 339 Ark. 192, 4 S.W.3d 501 (1999). The trial court has discretion pursuant to Rule 37.3(a) to decide whether the files or records are sufficient to sustain the court's findings without a hearing. *Sanders, supra*. In accordance with this rule, a trial court need not hold an evidentiary hearing where it can be conclusively shown on the record, or the face of the petition itself, that the allegations have no merit. *Id.* Here, the trial court made specific findings from the record that supported his decision to deny appellant's petition. We cannot say that the trial court erred when it denied appellant's petition without a hearing.

Furthermore, postconviction matters, such as petitions pursuant to Rule 37.1, are considered civil in nature with respect to the right to counsel; there is no absolute right to appointment of

counsel in civil matters. *See Virgin v. Lockhart*, 288 Ark. 92, 702 S.W.2d 9 (1986) (*per curiam*).

Thus, we find no error in the trial court's decision not to appoint counsel to represent appellant in the Rule 37.1 matter.

Affirmed.